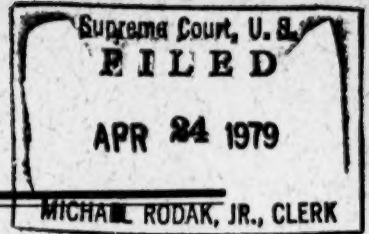


No. 78-1258



In the Supreme Court of the United States

OCTOBER TERM, 1978

HERBERT PHILLIP SCHLANGER, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

**MEMORANDUM FOR
THE FEDERAL RESPONDENTS IN OPPOSITION**

WADE H. MCCREE, JR.
*Solicitor General
Department of Justice
Washington, D.C. 20530*

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1258

HERBERT PHILLIP SCHLANGER, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

**MEMORANDUM FOR
THE FEDERAL RESPONDENTS IN OPPOSITION**

Petitioner, a former sergeant in the United States Air Force, challenges the Air Force's decision to remove him from its Airman's Education and Commissioning Program, an officers' training program.

1. The Airman's Education and Commissioning Program (AECF) provides undergraduate education and officer training to selected enlisted men; it leads to a commission. Air Force regulations authorize the Commandant of the Air Force Institute of Technology (AFIT) to dismiss from the AECF program "any student who, in his opinion, * * * fails in any way to measure up to the high standards expected of Air Force officers." Air Force Manual 50-55 (July 1967).

Petitioner enlisted in the Air Force for a four-year term in December 1962. In 1965 he was selected for participation in the AECP. He then reenlisted in the Air Force for a six-year term. In January 1966 he began undergraduate studies at Arizona State University (Pet. App. 4b).

During the fall of 1967 petitioner became ill and received several grades of "incomplete" in his courses. In early 1968 he became involved in various civil rights activities at the University. On June 17, 1968, the Air Force notified petitioner, by letter, of his removal from AECP for "lack of officer potential," based on his absences from classes. The Air Force reassigned petitioner to another post (Pet. App. 4b-5b).

The Air Force permitted petitioner to complete his undergraduate studies at Arizona State at his own expense. He did so in 1969 and then began protracted litigation seeking his discharge from the Air Force. See *Schlanger v. Seamans*, 401 U.S. 487 (1971). After two previous actions (filed in Georgia and Arizona) had been dismissed on various procedural grounds, petitioner brought a habeas corpus action in the United States District Court for the District of Columbia, alleging, *inter alia*, that his removal from the AECP violated the Due Process Clause of the Fifth Amendment, violated his First Amendment rights, and breached his reenlistment contract. In response to an order to show cause, the government argued that the reenlistment contract did not obligate the Air Force to place petitioner in any particular duty assignment, that failure to attend classes was a proper ground for removal from the AECP,¹ and that the

¹See AFIT Student Regulation 2-2 (June 1967), which states that attendance of all classes is expected unless the student is excused.

investigation and removal procedures followed the applicable regulations. The district court dismissed the case (*Schlanger v. Secretary of the Air Force*, H.C. 39-71 (D.D.C. July 8, 1971)), and petitioner appealed. The Air Force then discharged petitioner of its own volition, some six months before the expiration date of his reenlistment term, and the court of appeals dismissed the case as moot (Pet. App. 5b-8b).

2. On July 18, 1973, soon after his discharge, petitioner filed the present action in the District Court for the District of Arizona, seeking a declaratory judgment that his removal from the AECP was unlawful and damages for breach of contract and unlawful detention in the Air Force. The district court initially dismissed the case as *res judicata*, on the basis of the earlier District of Columbia proceeding. The court of appeals remanded the case, with the suggestion that the parties brief the issue of the availability of judicial review and present a full record of the District of Columbia proceedings to the district court (Pet. App. 8b-9b).

On remand, the district court dismissed petitioner's complaint, both on *res judicata* grounds and on the ground that petitioner's claim was not appropriate for judicial review (Pet. App. 2b). The court of appeals affirmed on the ground of nonreviewability, finding it unnecessary to reach the *res judicata* issue (*id.* at 11b).

3. The court of appeals correctly affirmed the dismissal of petitioner's complaint, and there is no conflict among the circuits or other reason warranting this Court's review. As this Court has recognized, because "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian," the decisions of the military ordinarily are not subject to judicial review, except for the inquiry

whether the military had jurisdiction over the case and acted in accordance with military law. *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953). Accordingly, a district court must examine allegations in light of the reasons that support nonreview of military matters. As the court of appeals noted (Pet. App. 10b-11b), the factors that should guide the court have been stated succinctly by the Fifth Circuit in *Mindes v. Seamans*, 453 F. 2d 197, 201-202 (1971): (1) the nature and strength of the plaintiff's challenge to the military determination; (2) the potential injury to plaintiff if review is refused; (3) the type and degree of anticipated interference with the military function; and (4) the extent to which exercise of military expertise or discretion is involved.

The court of appeals correctly held that petitioner's claim is not reviewable under these standards. The challenged Air Force decision—to remove petitioner from the AECP and reassign him elsewhere—is essentially a discretionary duty order. The courts have consistently held that such orders are nonreviewable. See, e.g., *Arnheiter v. Chaffee*, 435 F. 2d 691 (9th Cir. 1970) (decision to relieve officer of command of ship); *Covington v. Anderson*, 487 F. 2d 660 (9th Cir. 1973) (suspension from flight status); *Cortright v. Resor*, 447 F. 2d 245 (2d Cir.), cert. denied, 405 U.S. 965 (1971) (transfer order).² The decision to reassign petitioner did

²Petitioner's contention (Pet. 8-9) that the Ninth Circuit's decision in this case is in conflict with the Fifth Circuit's decision in *Mindes* is incorrect. The court below cited *Mindes* with approval, and pointed out that the district court, after applying the *Mindes* analysis, had held this suit to be nonjusticiable. Although the court went on to say that "there is a simpler and perhaps sounder" (Pet. App. 11b) way of dealing with the case, the panel's approach is functionally identical to that of *Mindes*. The court here identified the dominant feature of this case—that petitioner seeks to challenge a military duty

not subject him to any onerous deprivation. Although a record of the action remains in petitioner's Air Force record, petitioner does not challenge any discharge, disciplinary action, or deprivation of any vested rights. The transfer simply has no continuing effect.³

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1979

assignment, and held that duty assignments are not subject to judicial review. This is just an application of the *Mindes* approach to a particular kind of case in which judicial review is especially inappropriate. No court has reviewed such a duty assignment, under the *Mindes* approach or otherwise, and there is thus harmony among the circuits.

³Petitioner's challenge to the composition of the panel of the court of appeals (Pet. 6-7) is frivolous. The panel consisted of three judges, consistent with 28 U.S.C. 46(b). Although only one of the judges is an active circuit judge, 28 U.S.C. 43(b) permits other judges to sit on the court of appeals. Petitioner does not argue that the judges who decided this case had not properly been designated to do so.